COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

RISING TIDE DEVELOPMENT, LLC

v.

SHERBORN BOARD OF APPEALS

No. 03-24

DECISION

March 27, 2006

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

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DECISION

I. PROCEDURAL HISTORY

In November 2001, Rising Tide Development, LLC, submitted an application to the Sherborn Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build 52 condominium units of mixed-income affordable housing on a 28-acre parcel of land on Whitney Street in a corner of western Sherborn where it borders the towns of Ashland and Holliston. The housing is to be financed under the New England Fund (NEF) of the Federal Home Loan Bank of Boston (FHLBB). After four public hearing sessions, a new proposal for a smaller development emerged, and the developer submitted revised plans for 34 units. Pre-Hearing Order, § II-5 (Apr. 20, 2005).[1] On August 4, 2003, the Board

1. Following its customary practice, the Committee issued a joint Pre-Hearing Order, agreed to by the parties. In addition to substantive matters, the parties stipulated that the developer satisfies the three jurisdictional requirements found in 760 CMR 31.01(1). Pre-Hearing Order, §§ II-19, II-20, II-21. The Board also stipulated that Sherborn had not met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock be subsidized housing; see 760 CMR 31.04), thus

unanimously granted a permit for 32 units, subject to many conditions. Exh. 1. From this decision the developer appealed to the Housing Appeals Committee.

On November 24, 2003, pursuant to 760 CMR 31.03, the developer filed a Notice of Project Change with the Committee, indicating its intention to once again pursue a larger, 48-unit proposal, this time with an on-site wastewater treatment facility. Pre-Hearing Order, § II-10. The Committee's presiding officer remanded the matter to the Board for further consideration of this proposal. Ruling, pp. 4-5 (Jun. 9, 2004). On September 28, 2004, the Board issued a "Remand Decision," approving 38 units with conditions. Pre-Hearing Order, § II-17, see Exh. 2. The developer renewed its appeal, and the Committee accepted prefiled testimony, conducted a site visit, and then, to permit cross-examination of the witnesses, conducted an oral hearing with a verbatim transcript.[2] Following the presentation of evidence, counsel submitted post-hearing briefs.

II. FACTUAL OVERVIEW

The developer proposes to construct 48 condominium units as single-family and duplex units on a site which is irregularly shaped, though roughly square. Exh. 4. The site's northern boundary is Whitney Street, which is a main road between Sherborn and Ashland. Exh. 4; 36, ¶ 10. To the East, it abuts an abandoned railroad right of way in Sherborn; to the

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foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order, § II-18.

2. On June 30, 2005, prior to the hearing, the Board filed a motion to include additional exhibits, which included nearly two dozen proposed exhibits, most of them related to the MEPA (Massachusetts Environmental Policy Act) process. This motion was ruled upon orally by the presiding officer during the hearing. Tr. I, 15-38. The ENF (Environmental Notification Form) and the Secretary's Certificate on the ENF were admitted. See Exh. 60, 61. A groundwater study was

west, the land abuts the Hillside Farms residential subdivision in Ashland, which was built in 1997; and to the south, it abuts Karitosis Estates, a new, 300-lot residential subdivision in the town of Holliston, which will compete with the proposed development in the new-housing market. Exh. 3, p. 3; 4, sheet 2; 11, p. "1 of 21" of "N.O.I. Application Report;" 36, ¶ 10; Tr. II, 38-39.

The site is currently a farm and includes a farmhouse, which will be converted to two residential units. Exh. 4; 36, ¶ 43. The neighborhood is zoned "Residence B," which permits single-family homes on two-acre lots. Pre-Hearing Order, § II-24; Tr. II, 11; Board's Brief, p. 2. It is located within the Zone II protective area that protects the town of Holliston's water supply. Board's Brief, 2. The design includes a private wastewater treatment facility, which permits a degree of clustering and greater density than would be possible with standard septic systems. Exh. 4; 36, ¶ 26. Overall, the design is creative and responsive to both environmental concerns (set-backs from wetlands and riverfront areas, reduction of lawn area, wastewater treatment, etc.) and social concerns (three- and four-bedroom market-rate and affordable units for families, common areas and walking paths, "New Urbanist" design features, etc.).[3] See Exh. 36, ¶¶ 27, 29, 30, 32, 39, 40, 43; Exh. 38, ¶¶ 8-11; Exh. 54, ¶¶1, 3-5; Exh. 4, sheet 6.

III. ECONOMIC EFFECT OF THE CONDITIONS

When the Board has granted a comprehensive permit with conditions, the ultimate

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also admitted. See Exh. 62. Cross-motions to strike portions of the testimony were withdrawn at the beginning of the hearing. Tr. I, 39-40.

3. The quality of the design is presumably due both to the experience of the development team, and also the fact that the Board worked conscientiously with the developer to resolve problems—even though impasse was ultimately reached on the question of how many units should be built on the site.

question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The Appellant must first prove that the conditions in aggregate make construction of the housing uneconomic. See 760 CMR 31.06(3); *Walega v. Acushnet*, No. 89-17, slip op. at 8, (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, the developer must prove that "the conditions imposed... make it impossible to proceed... and still realize a reasonable return [or profit] as defined by the applicable subsidizing agency...." 760 CMR 31.06(3)(b); also see G. L. c. 40B, § 20.

The proper methodology to be used in analyzing the economics of and ownership housing proposal is a Return on Total Cost analysis.[4] *Rising Tide Development, LLC v. Lexington*, No. 03-05, slip op. at. 11 (Mass. Housing Appeals Committee Jun. 14, 2005). Once the Return on Total Cost is established for a particular proposed development, we must determine whether it is reasonable, that is, whether it is sufficient in the marketplace to induce the developer to invest its resources in pursuing the proposal.[5]

A. The Developer's Presentation

The crux of the dispute between the developer and the Board is the number of

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4. As discussed in section II-B(1), below, the Board's expert used a different methodology. How ROTC is calculated is described in sections III-A, III-B(5), and III-C(3), below.

5. Detailed policy guidance concerning the use of this methodology has been provided in the appendix to a document issued in November 2003 by the Massachusetts Housing Partnership and endorsed not only by that agency, but also by the Department of Housing and Community Development, the Massachusetts Housing Finance Agency (MassHousing), and the Massachusetts Development Finance Agency (MassDevelopment). See "Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to M.G.L. Chapter 40B" (Massachusetts Housing Partnership and Netter, Edith M., November 2005). These guidelines were not available to the parties during the hearing, however, and therefore we do not consider upon them. In the future, however, it appears likely that the guidelines, though they do not have the force of law, will provide information,

housing units that should be permitted on the site. Thus, with regard to economics, what are primarily at issue are a number of conditions that either explicitly limit the development to 38 units or impose design constraints that have the same effect. Therefore, the developer introduced into evidence a *pro forma* for the 38-unit development approved by the Board, in addition to the *pro forma* financial statement prepared for the proposed, 48-unit development. Both of these *pro formas* and other evidence concerning the economics of the development were presented through the project's development manager. This witness, who is also a principal in the enterprise, is highly qualified to testify as an expert with regard to the economics of the proposal since he has worked for many years in affordable housing development.[6] Exh. 36, ¶¶ 1-9, 62; Tr. I, 46. The development manager testified that these *pro formas* were prepared using the standard methodology, ROTC, applied to affordable housing developments in Massachusetts, and we find, based upon that testimony and our own review of them that the methodology used is appropriate. Exh. 36, ¶ 71; 36-B; 36-C.

Our focus, of course, is on the economics of the 38-unit development approved by the Board, and thus, upon the proof offered by the developer with regard to the 38-unit *pro forma*. Specifically, the development manager developed the 38-unit *pro forma* (Exhibit 36-B) based upon the project approved by the Board in its Remand Decision. Exh. 36, ¶¶ 68-69. He first estimated development costs. Land acquisition cost is $2,152,500. Exh. 36, ¶ 72-74; 36-B. To estimate construction costs, the development manager asked two experienced residential construction firms to review the preliminary architectural plans for the proposal,

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structure, or background which should simplify proof by expert witnesses of the economic issues that arise under the Comprehensive Permit Law.

and he then developed an estimate of building construction costs based on the lower of the two detailed cost estimates that they provided. Exh. 36, ¶ 75-77; see Exh. 6. He obtained estimates for the costs of site development and of the wastewater treatment facility from a site development contactor. Exh. 36, ¶ 78-81; Exh. 42, p. 2. From past experience and discussion with other builders, he estimated costs of landscaping, common area improvements, utility company backcharges, and miscellaneous items. Exh. 36, ¶ 82. Additional typical "soft costs" were estimated using standard methodology. See Exh. 36, ¶¶ 84-93. Finally, "total development costs" were computed to be $22,988,400. Exh. 36-B.

The development manager then developed estimates for the sales prices of the market-rate units from a market analysis prepared by a real estate appraiser and his own research. Exh. 36, ¶ 94. Three-bedroom homes were estimated at $700,000 and four-bedroom homes at $790,000. Exh. 36. ¶ 94; see Exh. 44-A, pp. 40-42; 36-B. Sales prices for affordable units were set from a standard subsidizing-agency formula in a range from $169,000 to $210,000. Exh. 36, ¶ 95; 36-B. This resulted in revenues from "Total Sales" of $23,609,000. Exh. 36-B.

The estimated Return on Total Cost (ROTC) involves only a simple calculation.[7] The return is simply total sales less total development costs, that is, $23,609,000 minus $22,988,400 or $620,600. Exh. 36, ¶ 96; 36-B. The projected ROTC is return divided by total development cost, that is, $620,600 divided by $22,988,400 or 2.7%. Exh. 36, ¶ 97; 36-B.

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6. We are aware of the potential for this witness to be biased by his financial interest in the outcome of this case. That does not, however, disqualify him from offering expert testimony. See *Commonwealth v. Perkins*, 39 Mass. App. 577, 581, 658 N.E.2d 975, 978 (1995).

7. As we have noted before, because of the preliminary and approximate nature of these projections it is not necessary to use the related, but slightly more sophisticated Internal Rate of Return (IRR) analysis. See *Bay Watch Realty Tr. v. Marion*, No. 02-28, slip op. at 13-14, (Mass. Housing Appeals Committee Dec. 5, 2005).

This, the development manager testified, "is an extremely small margin of profit, [which] would not provide an even remotely sufficient return on investment and compensation for the principals' time and effort." Exh. 36, ¶¶ 96-99. This conclusion was confirmed by a second expert. Exh. 41, p. 6.

B. The Board' Response

In rebuttal, the Board challenged the developer's analysis on six grounds. See Board's Brief, p. 8. The most important testimony came from its expert financial witness. As with any *pro forma* review, his analysis in prefiled testimony was complex, and could be characterized equally well as a critique of the developer's *pro forma* or as a series of his own alternate *pro formas*. Many small points of discrepancy and sub-arguments could be gleaned from the testimony he presented, but we will address only those raised in the Board's brief. Those not specifically included among the six grounds argued in the brief are waived. *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995). As discussed in detail below, the Board first argues that the methodology used in the developer's *pro formas* is flawed (Board's Brief, pp. 12-18). Second, it challenges a number of the estimates in the developer's *pro forma*—sales prices (Board's Brief, pp. 19-21), related-entity payments (Board's Brief, pp. 21-22), developer's fees and double-counting of expense items (Board's Brief, pp. 22-24), and construction-cost estimates (Board's Brief, pp. 24-25). Third, the Board argues that the developer has not introduced credible, objective evidence of what return should be deemed reasonable (Board's Brief, pp. 9-12).

1. Methodology

The analysis of the Board and its financial expert is flawed in at least two ways. At the most fundamental level, as noted in at the beginning of section II, above, the proper methodology for analyzing whether the developer will be able to realize a reasonable return is to perform a ROTC (Return on Total Cost) analysis of the development proposal. But the Board's expert began his analysis by considering the "average pre-tax profit as a percent of sales" of twenty public multi-family construction companies. Exh. 46, ¶ 25. He also describes this "'profit margin,' which is profit as a percent of revenue," as a measure used nationally by the housing industry. Exh. 46, ¶ 27. Not only is this not the measure used for affordable housing under the Massachusetts Comprehensive Permit Law, but in addition, it measures a quantity that is irrelevant to these proceedings. It measures the profit margin of a development company, which may be engaged in many development ventures simultaneously. Exh. 56, ¶¶ 2-4, ¶ 3 (last sentence). But the question before us is whether the return that will be realized by the development company on this *particular* development venture will be reasonable. 760 CMR 31.06(3).

Second, the challenge to the methodology used in developer's *pro forma* that is made in the Board's brief is that it fails to take into account that sales prices of houses will rise between the time when the *pro forma* was prepared and their actual sale to residents. See Board's Brief, pp. 12-18 (this argument appears to be developed in less detail in testimony). This argument, however, misunderstands the overall context in which profit projections are prepared. As we have noted in the past, not only is the ultimate projection of total profit merely an estimate, but in addition, nearly all of the factors on which the calculations are based are themselves estimates. That is, as we noted in our decision in *Rising Tide*

Development, LLC v. Lexington, No. 03-05, slip op. at 16 (Mass. Housing Appeals Committee Jun. 14, 2005), "even if only one factor were an estimate—the final sales prices, for instance—and the others were know quantities, there would be an element of speculation in the ultimate conclusion. But not only the sales prices, but also nearly all of the costs are also unknown to one degree or another."[8] One of the most unpredictable elements in any case, but particularly when a proposal is in litigation, is when construction will begin and when it will be completed. For this reason, to minimize speculation, the *pro forma* must be a snap shot of the finances of the proposal at a particular time. It is not realistic to attempt to choose among various snapshots projected into various dates in the future. The developer's use of December 31, 2004 sales prices in a *pro forma* prepared and filed with the Committee as evidence in this hearing in April 2005 is acceptable practice, and we find no fault with the methodology.[9] Also see Exh. 58, ¶¶ 15, 16; Tr. I, 95; II, 40-41, 60-61.

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8. For example, if we assume that sales prices will rise, it is also likely that construction costs will rise. See Exh. 58, ¶ 15; Tr. II, 60.

9. The most logical time to assess land acquisition value (which is not in dispute in this case) is when the developer first prepares its *pro forma* and submits a request to the subsidizing agency for a project eligibility determination pursuant to 760 CMR 31.01(2). Arguably, for the sake of uniformity, all estimates in the *pro forma* should reflect costs and values on that date. Of course, as the permit application proceeds through local hearings and possibly hearings before this Committee and the courts, those estimates become dated. But market conditions are so variable and difficult to predict with accuracy that we believe that the advantages of the clarity obtained by referring to a single date are likely outweigh the disadvantages of using old estimates. As of yet, however, there is no definitive policy from the subsidizing agencies with regard to what date should be used, and thus, litigants have considerable flexibility in how they may present their cases. Policy guidance would be useful in this regard because there are many complex questions imbedded within this issue. An example is the question of whether, when a development is delayed several years by litigation, the prices of either the affordable units or the market-rate units, or both, should be revised at the time they are finally sold. Presumably, the subsidizing agency would review the original financial projections and reconcile them to current conditions, but since it would be illogical to sell market-rate units at below market prices, affordable prices would be reduced further or more units sold as affordable.

2. Sales Prices

In 2001, the developer engaged a real estate appraiser who prepared a lengthy and detailed report identifying comparable land sales and market pricing indications for cluster housing in relation to the proposed development—the McKinney report. Exh. 33. In January 2005, a market analysis to provide more specific data for pricing of the market-rate homes—the Bucklin analysis. Exh. 44-A. This analysis considered not only the community characteristics, demographic factors, neighborhood sales, but also affordable housing developments in Ashland, Boxborough, Franklin, and Weston, and traditional subdivisions in Natick. Exh. 44-A. The development manager used this information, together with his own research and judgment to prepare the estimated sales prices used in the *pro forma*. Exh. 36, ¶ 94; Tr. I, 95-96. The Bucklin report recommended a range of from $675,000 to $725,000 for the attached, two-bedroom units and from $754,000 to $797,500 for the four-bedroom homes. Exh. 44-A, p. 42. The prices listed on the pro forma are, respectively, $700,000 and $790,000.[10] Exh. 36-B.

The Board did not commission a market analysis of its own, though it did engage a well qualified consultant with credentials similar to those of the developer's experts. Exh. 45-A. Through prefiled testimony this expert presented a sophisticated analysis, but one which focused primarily on challenging the developer's failure "to recognize sale price trend over time in the market area." Exh. 45, ¶¶ 34, 37. For the reasons discussed in section III-B(1), above, this analysis is largely irrelevant to the issues at hand. But even if we were to

10. It was pointed out on cross-examination that an earlier *pro forma*, prepared prior to the Bucklin analysis, listed the sales price of the larger units at $740,000. Tr. I, 83. In using the later, higher figure in the *pro forma* prepared for this litigation, the developer increased its projected revenues by over $1,000,000, placing itself in a less advantageous position in attempting to sustain its burden of proof.

accept this approach, there are many points at which he and the developer's experts are at odds. See, e.g., Exh. 55; 56, ¶¶ 10, 11; 58, ¶¶ 14-18. We conclude that the analysis of the developer's experts is the more appropriate and credible.

In its brief, the Board also maintains that even using the December 31, 2004 valuation date, there are "questionable assumptions underlying the projected sales prices for market-rate units." See Board's Brief, pp. 19-21. Arguing that the McKinney report studied more towns than did the Bucklin analysis, it asserts that the Bucklin analysis focused on Ashland, Holliston, Franklin, Boxborough, and Natick, "but did not include Dover, Lincoln, or Wayland." It argues that house prices can generally be expected to be higher in the latter group of towns because of their higher *per capita* incomes, highly ranked public schools, and other factors. And, it points out that Mr. Bucklin acknowledged differences among the towns on cross-examination, including differences in per-square-foot sales prices of homes. Tr. II, 22-37.[11] But the McKinney report was a different, more general study than the Bucklin analysis, and more important, it examined comparable affordable housing developments in the towns of Ashland, Boxborough, and Franklin. Exh. 44-A, pp. 22-33. There is no evidence that there are comparable affordable housing developments in Dover, Lincoln, or Wayland, nor, if there are, whether their sale prices cast doubt on the Bucklin analysis. In addition, an affordable housing cluster development in Weston, which is comparable to Sherborn by any standard, *was* also included in the analysis. Exh. 44-A, pp.34-36. We conclude that the Bucklin analysis is credible, and that the estimated sales prices used in the

11. Citing only to the testimony of the developer's manager, the Board also argues that "in developing his estimate, Bucklin did not attempt to account for differences in lot sizes, such as the increase in lot size that results from the reduction to a 38-unit project," nor was a possible difference in value between single-family market-rate units and duplex market-rate homes considered. Board's

pro forma are acceptable.[12]

3. Related-Entity Costs

The developer, Rising Tide Development, LLC, received an acquisition loan of approximately $800,000 from a closely related entity, Rising Tide Development Fund, which is owned by the two individuals who are the managers of Rising Tide Development, LLC. Tr. I, 47-48, 75. The interest on this loan, $345,000, will be paid to Rising Tide Development Fund by Rising Tide, LLC, is carried on the pro forma as a development cost. Tr. I, 75-77; Exh. 36-B. We accept the testimony of the Board's expert, and find that the developer has not met its burden of establishing this is a proper cost, and it should therefore be removed from the *pro forma*. See Exh. 46, ¶ 37; also see Board's Brief, pp. 21-22; cf. Exh. 41, p. 4.

4. Developer Overhead

The Board claims that a developer's fee is improperly listed as a cost, and that expense items such as insurance and on-site construction management are double counted. See Board's Brief, pp. 22-24.

The development manager testified that of the $550,000 allocated to overhead and administration, $400,000 will be paid to the developer to compensate the principals for their services and to pay for the normal administrative expenses incurred by a small business, and $150,000 will be spent to contract with an on-site construction manager. Tr. I, 78-81. The

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Brief, p. 21. It seems likely that the effect of these differences is small, and in any case we find that there is not sufficient evidence to support lower sales prices based upon this argument.

12. The Board quite correctly points out that the developer "arbitrarily" listed the sales price of the two- or three-bedroom renovated farmhouse unit as $169,000 on the 38-unit *pro forma* instead of the $195,000 that appeared on the 48-unit *pro forma*. Exh. 36-B, 36-C; Tr. I, 84-85; see Board's Brief, p. 21, n.19. The proper cost to be carried on the *pro forma* is $195.000.

record is ambiguous with regard to exactly how such expenses should be handled. The Board's position is based largely upon its financial expert's testimony that state policy is that "profit... is limited [by the Department of Housing and Community Development's February 24, 2003 'Guidelines for Housing Programs in which Funding is Provided Through a Non-Governmental Entity' to] 20% of the total allowable development costs and such other sums as the Project Administrator may determine constitute a developer's contribution to the project, provided that calculation of total allowable development costs shall not include any fee paid to the developer." Exh.. 46, ¶ 32(a). The guidelines to which he referred were not offered into evidence. The development manager and the developer's financial expert both contradicted this testimony, indicating unequivocally that the amount allocated to overhead and administration conforms to standard affordable housing finance practice.[13] Exh. 58, ¶¶ 21-25; 56, ¶ 7, Tr. II, 58-59. This testimony was not undercut on cross-examination, though admittedly, the testimony of the developer's expert was unclear.[14] On balance, we find the testimony of the developer's two witnesses on this issue to be the more credible, and that the $400,000 paid to the developer is appropriate as a cost for overhead and administration. The remaining $150,000 to be paid to a third party as an on-site construction manager (distinct from the construction contractor) is certainly proper. Tr. I, 80; Exh. 58, ¶ 23.

Similarly, we are not persuaded by the Board's argument that insurance costs are

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13. On the record before us, it is unclear whether "project overhead and administration" is synonymous with the "developer fee" that the Board's expert alleges must be excluded. We assume that that is the case.

14. The testimony was as follows. See Tr. II, 57.
    Q. Are you aware of section 12 of those guidelines in which it ... says that... in determining allowable development costs, it shall not include any fee paid for the developer...?
    A. I'm familiar with that language, yes. What I understand that to mean is when you're calculating the profit, you don't include the profit in the calculation of what you're calculating.

duplicative since the developer "would be named as additional insureds on the general contactor's insurance." Board's Brief, p. 23; also see Exh. 46, ¶ 32(d); Tr, I, 61-62. We find credible the testimony of the development manager and the testimony of the developer's financial expert, that is, that he was "aware of no line items in the developer's *pro forma* which have been listed twice." Exh. 56, ¶ 7; also see Exh. 58, ¶ 21; Tr. I, 104.

5. Construction Cost Estimates

The Board also argues that the developer's construction-cost estimates are too high. See Board's Brief, pp. 24-25.

The development manager obtained a detailed conceptual estimate of building construction costs from an experienced estimator employed by a construction company. Exh. 43; 43-B; 56, ¶ 75. This was based on preliminary architectural plans. Exh. 43, p. 1; 58, ¶75; see Exh. 6. He also obtained second estimate from another construction company. Exh. 58, ¶ 77. These estimates admittedly were at the "high end" for affordable housing developments. Tr. I, 88. The development manager testified that these figures were consistent with his professional experience, and he used the lower, more conservative figures in preparing the *pro forma*. Exh. 36, ¶¶ 76-77; Tr. I, 87.

The evidence presented by the Board was also detailed, but more conjectural. For example, the Board's financial expert testified that construction costs "*may* be overstated" by $1,519,032. Exh. 46, ¶¶34, 35 (emphasis added). (This is based in part on speculation that lower quality building materials could be used in the affordable units. Exh. 46, ¶ 34(a).) More significantly, the methodology used by the developer's expert is more detailed and generally more accurate. Exh. 53, ¶¶ 2-3. We find the testimony offered by the developer to be more credible, and conclude that the construction cost estimates used in the pro forma are

appropriate.

6. Reasonable Return

The Board argues that the developer has not introduced "substantial, objective evidence" of what return should be deemed reasonable, and that instead the testimony of its experts is "hearsay and speculation." See Board's Brief, pp. 9. We disagree.

Admittedly, our regulations envision a precise, objective standard for profit, that is, reasonable return "as defined by the applicable subsidizing agency." 760 CMR 31.06(3)(b). At the time of hearing, however, the subsidizing agencies overseeing the development of affordable housing had not published any such clear, uniform standard.[15] Exh. 46, ¶¶ 15, 24, 28. Thus, as we have done in previous cases, we must determine as a factual matter what level of return is reasonable.

With regard to the 38-unit *pro forma*, the development manager testified that a 2.7% profit "is an extremely small margin of profit, [which] would not provide an even remotely sufficient return on investment and compensation for the principals' time and effort." Exh. 36, ¶¶ 96-99. In addition, he went on to testify that "the threshold for proceeding with a project of this type for most investors and developers is a projected profit in the mid-teens to twenty percent," and that the proposed development is "relatively high risk and would normally expect (sic) a profit margin in the high teens." Exh. 36, ¶ 99. This opinion was supported by the testimony of an independent finance and development consultant employed by the developer as an expert witness. That expert's opinion, based upon anecdotal information obtained in representing other developers and data from homeownership

15. Such a standard has been published in the "Local 40B Review and Decision Guidelines," which are discussed above. See § III, n.5. Since the guidelines were not available to the parties during the hearing, however, we do not consider upon them.

developments approved by MassHousing (the Massachusetts Housing Finance Agency), was that the threshold was "approximately 15%." Exh. 41, p. 9; 41-B; Exh. 41, p 6.

As noted above, the approach to profit used by the Board's witness is flawed. See § III-B(1), above; also see Exh. 46, ¶ 27. In addition, he analyzed the same data from MassHousing that the developer's expert analyzed, though his sample consisted of only nine of the seventy-four developments used by the latter. Exh. 46-B. The highest profit shown in the sample used by the Board's expert was 14%, though over *half* of the developments in the overall sample showed a profit greater than 14%. Exh. 42-B; 46, ¶ 28.

Though the developer has not been able to establish the threshold for a reasonable return with precision that a subsidizing agency could as a matter of policy, it has clearly established, as a matter of fact, based upon expert opinion, that the threshold is a percentage in the "mid-teens."[16]

C. Synthesized *Pro Forma* Analysis

As indicated above, the developer's simple, one-page *pro forma* (Exhibit 36-B, first page) was prepared using the standard methodology for affordable housing developments built under the Comprehensive Permit Law. Following that format and based upon our findings with regard to the Board's objections, as discussed above, the following are the best estimates of development costs.

16. The 48-unit pro forma shows only an 11.5% profit. This is not inconsistent with the testimony or our conclusion since developers are frequently forced to accept lowered profits for developments that are subject to protracted litigation.

1. Development Analysis

Land Acquisition		**2,152,500**	not disputed
Hard Costs			
Demolition	35,000		not disputed
Site Work[17]	2,008,900		not disputed
Lot Work/Private Wells	532,000		not disputed
Sewage Treatment	550,000		not disputed
Lawns and Plantings	266,000		not disputed
Common Area	250,000		not disputed
Utility Co. Backcharges	225,000		not disputed
Construction-New Homes	11,310,000		developer's figure, § III-B(5)
Renovation-Farmhouse	314,000		developer's figure, § III-B(5)
Direct Construction	15,490,900		
Construction Contingency[18]	775,000		not disputed
Sub-Total, *Hard Costs*		**16,265,900**	
Soft Costs			
Architectural Fees	200,000		not disputed
Engineering Fees	550,000		not disputed
Permit Fees	185,000		not disputed
Legal Fees	360,000		not disputed
Monitoring Agent…	55,000		not disputed
Appraisal/Accounting	28,000		not disputed
Insurance	70,000		not disputed
Taxes/Utilities	45,000		not disputed
Marketing Expenses[19]	1,079,000		not disputed
First Mtge., Taxes, Ins., etc.	330,000		not disputed
Subordinated Acquis. Debt	-0-		Board's figure, § III-B(3)
Construction Period Interest	497,000		not disputed
Unit Closing Costs	76,000		not disputed
Overhead & Admin.[20]	550,000		developer's figure, § III-B(4)
Soft Cost Contingency[21]	200,000		not disputed
Sub-Total, *Soft Costs*		**4,225,000**	
Total Development Cost		**22,643,400**	

Thus, we find that the total development cost for the 38-unit development approved by the Board is $22,643,400.

17. Site work includes infrastructure and leaching fields for the wastewater treatment facility.
18. The Construction Contingency is 5% of Direct Construction costs.
19. Marketing expenses are 5% commissions and other expenses.
20. Project overhead and administration are 2½% of Total Development Cost.
21. The soft cost contingency is 5% of Soft Costs.

2. Revenues from Total Sales – Calculation of revenues is quite straightforward. Based upon our findings with regard to the Board's objections, as discussed above, the following figures represent best estimates of sales prices.

House Type	*No.*	*Price*	*Total Sales*	
2 or 3 BR Farmhouse Afford.	1	169,000	195,000	Board's figure, § III-B(2), n.9.
4 BR Farmhouse Afford.	1	210,000	210,000	developer's figure, § III-2
3 BR Affordable "A"	2	195,000	390,000	developer's figure, § III-2
4 BR Affordable "E"	6	210,000	1,260,000	developer's figure, § III-2
3 or 4 BR Market "D," "D-1"	6	700,000	4,200,000	developer's figure, § III-2
4 BR Market "D," "D-1," "C"	22	790,000	17,380,000	developer's figure, § III-2
Revenues from Total Sales			**23,635,000**	

Thus, we find that revenues from total sales are $23,635,000.

3. ROTC – The projected return is revenues from total sales less total development costs, that is, in this case, $23,635,000 less $22,643,400 or $991,600. The return on total cost (ROTC) is revenues from total sales divided by total development cost, that is, $991,600 divided by $22,643,400 or 4.4%.

The threshold for a reasonable return is a percentage in the "mid-teens." Section III-B(6), above. We conclude that return of 4.4% is not a reasonable return, and that therefore the conditions imposed by the Board have rendered construction of the proposed development uneconomic.

IV. LOCAL CONCERNS

Since the developer has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for low or moderate income housing.[22] 760 CMR 31.06(7).

In this case, the issues raised by the Board concern its belief that a development of 48 housing units is too dense and intense a use of the land and that it that has an unacceptable impact on groundwater and natural resources protected by the town's wetlands bylaw. Pre-Hearing Order, § IV-4 (page 8). It makes the following specific arguments in this regard: that groundwater supplies in Sherborn and Holliston are in jeopardy, that the intensity and placement of buildings raises fire safety issues, and that the density or intensity of the development impinges on various environmental concerns. It also raises various miscellaneous concerns that we will address last.[23]

A. Groundwater Protection

The local concerns addressed most thoroughly by the Board concern protection of water supply. It raises several arguments in this regard. As an initial matter, however, it is clear that a majority of the site is within the Zone II protection area for public water supply

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22. The town has not satisfied its minimum housing obligations, that is, the statutory minima described in G.L. c. 40B, § 20. Pre-Hearing Order, § II-18; see 760 CMR 31.04; also see Exh. 36, ¶¶ 12-18. This creates the presumption—"compelling evidence" that the regional need for housing outweighs the local objections—that underlies the burdens of proof established in our regulations. See 760 CMR 31.07(1)(e); *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 367, 294 N.E.2d 393, 413 (1973).

23. There is some ambiguity in the Pre-Hearing Order, and these miscellaneous issues, and arguably some other issues, were not clearly raised in the section describing the Board's case. See Pre-Hearing Order, § IV-4 (p. 5-8). Though it could be argued that we need not consider them, we believe that the fairer approach is to address the issues that are clearly and specifically raised in the

wells for the town of Holliston. Exh. 37, ¶ 8(f); 48, ¶ 7; Exh. 4, sheet 3; Tr. II, 6. There is no allegation that the development is in any Sherborn well-protection area. A Zone II area is one in which water-borne contaminants are presumed to have a relatively high chance of reaching the water supply well in that area, and therefore stormwater runoff must be treated to a greater degree than it is in non-protected areas. Exh. 48, ¶ 7; Tr. II, 7.

1. Density and the Holliston Water Supply (Board's Brief, pp. 26-28) – The Board not only argues that its conditions that decrease the number of housing units on the site will protect groundwater resources, but also notes that the General Plan prepared by the Sherborn Planning Board indicates that "Sherborn's two-acre zoning serves to protect the recharge area around Holliston's public well." Exh. 32, p. 19. In its argument, however, the Board points to *state* groundwater protection requirements, which limit the density of development in Zone II protection areas. See Board's Brief, pp. 26, 28; Exh. 51, ¶18; 310 CMR 22.21. This approach does not stand up to analysis. Generally, over fairly large geographical areas there is a logical connection between large-lot zoning and groundwater protection since bigger lots result in fewer private septic systems and, typically, some reduction in impervious surface. But the development proposed here will use an on-site wastewater treatment facility instead of septic systems, and impervious surface will be limited by the cluster design chosen. To address groundwater protection in such cases, there are specific state regulations for wastewater treatment facilities and open space in a Zone-II area, and those regulations will be

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Board's Brief. Issues not briefed are waived. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995).

enforced in any case.[24] Though this is a matter of law, the developer's expert confirmed in testimony that these regulations will be complied with. Exh. 37, ¶¶ 15, 16, 60, 62, 71; also see Exh. 9. In granting a permit for 38 units, the Board has conceded that the two-acre zoning in place in this area (which would permit about a dozen houses and septic systems) is not essential to protect the Holliston water supply. Further, the Board did not present specific evidence of what exactly the local concern for the Holliston water supply might be. For instance, there was no evidence concerning the size or location of either the Holliston well or its Zone II, concerning its use or importance to the town, or concerning any local hydrogeologic features that might indicate that the state standards do not provide enough protection. We find that the Board has not proven that there are specific local concerns related to groundwater that show that an additional 10 units will cause harm that outweighs the regional need for affordable housing.[25]

2. Density and the Sherborn Water Supply (Board's Brief, pp. 26-28) – Next, the Board argues that the town's General Plan states that along the Holliston border there are known aquifers, and that large-lot zoning also provides protection should future use by the town of Sherborn ever become necessary. Exh. 32, p. 19. The Board concedes, however, that at present the town of Sherborn does not even have a public water supply. Board's Brief, p. 27. Further, the town's 2003 Groundwater Protection Study indicates that there are a number of aquifers, in particular, in the southeastern area of town, in the vicinity of Farm

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24. The Sherborn Conservation Commission has issued an order of conditions approving the project under the state Wetlands Protection Act, with findings concerning public and private water supply, groundwater supply, and other interests protected by the act. Exh. 10, p. 2.

25. In a separate part of its Brief, the Board argues that several conditions concerning snow removal, soil removal, earthwork, and wastewater pump stations are necessary. Board's Brief, pp. 42-45. These issues can also be resolved under state groundwater protection requirements. See, e.g., Exh. 37, ¶¶ 64, 68-69.

Pond, and in the northeastern portion of town, that are "favorable" and "could serve the town's future needs." Exh. 62, pp. 3-2 to 3-3. On the other hand, the aquifer near the development proposed here—the Dopping Brook/Bogastow Brook aquifer—is "thin" and not highly productive. Exh. 62, pp. 3-2, 4-7. Speculation by the Board about possible future use of this aquifer is not a legitimate local concern that should stand in the way of the construction of affordable housing.

3. Private Water Supply (Board's Brief, pp. 39-42) – The Board also imposed a condition requiring compliance with all of the town's Board of Health private well regulations instead of general state guidelines, as proposed by the developer. Exh. 2, finding 5 (p. 19). The Board bears the burden of proving that valid local concerns support this condition and that the condition outweighs the regional housing need.[26] 760 CMR 31.06(7). In prefiled testimony, the Board addressed many different provisions of the local regulations in considerable detail. See Exh. 48. The developer, on the other hand, is concerned only with whether state or local procedures should be used "to test whether a private water supply well is capable of producing sufficient water to meet the household demand." Exh. 40, p. 2 (para. 3-4); Appellant's Brief, pp. 25. The developer's expert testified unequivocally that wells meeting the state guideline requirements will provide sufficient capacity. Exh. 40, p. 3; 52.

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26. Technically, because this case involves an approval of a permit with conditions, the developer has no burden of proving that its proposal complies with generally recognized standards. Cf. 760 CMR 31.06(2). As a practical matter, it is important to note that the developer is committed to complying, as a minimum, with the state Department of Environmental Affairs (DEP) Private Well Guidelines (Exhibit 28). (This commitment can be inferred from the evidence, and, lest there be any ambiguity, we have required it by condition. See Exh. 53; § V-2(b), below.) That is entirely appropriate, even if, as the Board maintains, these guidelines are not binding state policy, but rather standards designed to assist local boards of health in drafting their own regulations. See Exh. 48, ¶ 12.

Clearly, the town's testing procedures relating to well capacity are more stringent than the state guidelines. Exh. 48, ¶ 14(c). To justify imposing these standards, the Board must show that they are supported by specific local concerns—typically, conditions specific to this site. The Board's expert acknowledged as much in objecting to the use of the state standards since "they do not purport to consider local water supply conditions." Exh. 48, ¶ 12. He did not go on, however, to specify the exact local conditions that might support higher standards.[27] He noted only that they "provide an additional measure of security," and then, in fact, conceded that "[t]his measure of security seems greater than necessary." Exh. 48, ¶ 14(c)(page 8). This is insufficient to meet the Board's burden.

It appears that the developer does not have serious objections to other requirements imposed by the Board (e.g., pressure storage tanks, turbidity standards, irrigation regulations, contaminant removal), and they will therefore remain in effect. See Exh. 48, ¶¶ 14(b), (d), (e), (f). Compliance with these local requirements and standards, as well as the application of the state guidelines for capacity testing, shall be overseen by the Sherborn Board of Health, under the supervision of the Board, and, if necessary, this Committee. See Exh. 48, ¶ 14(a).

B. Fire Safety

1. Building Spacing (Board's Brief, pp. 29, 35-36) – The Board justifies its reduction in density, in part, by concerns that closely spaced buildings present an unacceptable risk of the spread of fire from building to building, and it also imposed a condition requiring greater spacing. Exh. 2, finding 11(i) (p. 29). The buildings in the

27. As noted above, it seems that the aquifer here is "thin," and the expert makes a passing references to "the measured saturated thickness within the overburden at the Rising Tide site." But the implications of "thinness" are not clear from his testimony, and he gives no indication of whether this is problematic for private wells. Exh. 48, ¶ 14(c)(page 7).

development are generally 20 to 30 feet apart. Exh. 38, ¶ 9. The developer's architect is experienced in the design of planned residential and cluster developments. Exh. 38, ¶¶1-3, 38-A. He testified that the design proposed here is typical of cluster developments, and that the spacing of the buildings is safe. Exh. 38, ¶¶ 8-9. The Sherborn fire chief testified that site is three miles from the town fire station, and that the most distant building in the development is another four-tenths of a mile from the entrance, resulting in an emergency response time of 8.6 minutes. Exh. 50, ¶ 8. The unstated inference is that the longer response time means that the risk of fire spreading is greater in this location than in more urban communities. Beyond that, the fire chief testified only in the most general terms. For instance, he testified that the condition requiring houses to be oriented "'so as to minimize the likelihood of fire spread'...serves an important local interest in preventing the spread of fire," and that "the density of the development... is a cause for some concern by the Department," and that "to the extent that the buildings are located so as to maximize their separation..., the risk of spread of fire will be better controlled." Exh 50, ¶¶ 15, 16, 17. We find that there is not sufficient evidence of the risk of fire spreading from one building to another to outweigh the regional need for housing.[28]

2. Emergency Access (Board's Brief, pp. 35-36) – The Board also imposed a condition requiring that the 18-foot-wide emergency access road be paved. Exh. 2, finding 11(g) (p. 29). The emergency access roadway proposed by the developer is a short, less-than-100-foot drive that connects one of the cul-de-sacs to Whitney Street. Exh. 4, sheet 2; Tr. 1, 96. The developer's civil engineer testified that it would be made of "gravel or stabilized

28. Particularly given the quality design of the proposal, which draws upon New Urbanist and Smart Growth principles, the Board's additional argument (Board's Brief, p. 32; Exh. 49, ¶ 25) that the building spacing will deprive residents of adequate air, sunlight, and privacy is far-fetched. Exh. 54, ¶ 3.

grass pavers," and that it would provide safe emergency vehicle access. Exh 49, ¶ 52. The Sherborn Fire Chief testified that his department has a "strong preference" that the roadway be paved since it could be more easily maintained and cleared during the winter, and since illegal parking would be less likely than on a gravel road. Exh. 50, ¶¶ 10, 11. Though in his opinion a paved road would better ensure the department's ability to respond to emergencies, he also acknowledged that the department "could accept an emergency access road constructed using a gravel surface or 'grass pavers,' provided that it was designed to handle the department's heaviest fire apparatus… and was adequately maintained…." Exh. 50, ¶¶ 18, 12. We find that this evidence is insufficient to sustain the Board's burden of proving a local safety concern that outweighs the regional need for housing. To address the chief's concern that the roadway not be attractive for parking, we will require that grass pavers rather than gravel be used. See section V-2(c), below.

C. Environmental Concerns

1. Wetlands (Board's Brief, pp. 36-39) – The Sherborn wetlands bylaw provides for protection of wetlands resources beyond that provided for in the state Wetlands Protection Act. Most significantly, it establishes a 100-foot protective buffer around stream banks, bordering vegetative wetlands, isolated land subject to flooding, and other wetlands resources, including vernal pools, and that buffer is itself considered a protected resource. Exh. 47, ¶¶ 13(b), (c), (f). The first 50 feet of this buffer is a "no alteration zone." See Exh. 39, ¶ 26; 47. ¶ 13(e). The primary purposes of protecting these areas is to maintain a cover of locally indigenous vegetation to reduce water pollution and erosion and to protect wildlife, wildlife habitat, and wildlife corridors. Exh. 47, ¶ 13(d).

Though the development will cluster the housing units to some degree, they do nevertheless impinge upon protected areas, particularly areas protected by the local bylaw.[29] No houses are in the 200-foot riverfront area. Exh. 4, sheet 2, Exh. 47-B. But portions of seven houses and one entire house appear to be within the 100-foot buffer zone of two different wetlands. Exh. 4, sheet 2, Exh. 47-B; Exh. 47, ¶17. If flood-plain areas as well as wetlands are considered, it appears that portions of 14 houses are within the state-established buffer zone. Exh. 4, sheet 2, Exh. 47-C; Exh. 47, ¶18. And portions of over half the houses are within the buffer zones that are established as protected resources under the local wetlands bylaw. Exh. 4, sheet 2, Exh. 47-D; Exh. 47, ¶19.

It is less clear, however, what the impact of these encroachments will be. This is the case in part because negative impacts will be balanced to some extent by positive changes. Significant areas will be kept in a natural state, and the developer has accepted a number of limitations imposed by the Sherborn Conservation Commission in its Order of Conditions issued under the state Wetlands Protection Act. Exh. 37, ¶ 46; Ex, 38, ¶ 13; Exh. 39, ¶¶ 19-22. For instance, over four acres of the site will be converted from hayfield to wildlife meadow, much of it demarcated by a stone wall to be built by the developer and mowed only annually;[30] pesticide use and irrigation have both been limited. Exh. 10, ¶¶ 72, 79, 102-104 ; 37, ¶¶ 42-44; 57, ¶ 3. In addition, all existing edge habitat and the tree line along the eastern, southern, and western limits of the farm will be retained. Exh. 57, ¶ 2.

Of particular concern is an off-site certified vernal pool. Part of the pool's 100-foot buffer is forested, and part is currently a hay field on which the developer proposes to build a

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29. The most complete description of the various sorts of protected areas appears in the testimony of the developer's wetlands expert. See Exh. 39, ¶¶ 8-13.

tennis court. Exh. 39, ¶ 27; 47, ¶ 24. Significant pool-breeding amphibians rely on the buffer area for part of their life cycle, but the forest-floor characteristics (e.g., uncompacted organic litter and shade) that they depend upon are not present within the hayfield. Exh. 39, ¶28. Nor does it appear likely that they will need to migrate across the area where the tennis court is proposed. Exh. 39, ¶ 29. Based upon this, the Developer's expert testified that it was her opinion that the development will have no adverse impact on the vernal pool habitat.[31] Exh. 39, ¶¶ 18, 29. The testimony of the Board's expert does not refute this. In fact, it focuses primarily on wildlife, including large mammals, that does not rely on the vernal pool as habitat. Exh. 47, ¶¶ 26-27. His conclusion is speculative: the tennis court "*may* result in degradation of the value as wildlife habitat and a wildlife corridor...." Exh. 47, ¶ 28 (emphasis added).[32]

Similarly, the evidence presented by the Board with regard to areas of the site other than near the vernal pool was quite general. For example, the Board's expert testified with regard to a small, 1,600-square-foot area of isolated vegetated wetland (IVW) within a much

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30. One and one half acres of this will be a shallow stormwater detention basin.

31. There was also testimony concerning the opinion of a state official, but we discount that testimony since it is hearsay that even under the relaxed standards in administrative proceedings cannot be considered reliable. See Exh. 39, ¶ 16. There is more definitive evidence, however, that no state jurisdiction under the Massachusetts Endangered Species Act (G.L. c. 131A) has been asserted. Exh. 17; 18; 39, ¶ 17. Further, though the record is unclear, we assume that the off-site vernal pool is not within another wetlands resource area, and therefore, with regard to the state Wetlands Protection Act (G.L. c. 131, § 40), our understanding is that there is no protective buffer surrounding it. We are still left, however, with concerns under the local bylaw, which establishes a 100-foot protective buffer around vernal pools.

32. We note that the developer has not proposed lighting for the tennis court. Though the degree to which lighting might disturb wildlife is also somewhat speculative, we will ensure by condition that the tennis court remains as proposed. See section V-2(d), below.

larger area of isolated land subject to flooding (ILSF) in the northwestern corner of the site.[33] He noted that the IVW will be eliminated and that the ISLF will be drastically altered to provide for a stormwater detention basin; he acknowledged that those alterations were approved under state wetlands standards. Exh. 47, ¶¶ 30, 32. He then indicated that it is not clear whether the local bylaw imposes different standards, but that at a minimum, the interests protected by the bylaw are broader than those protected by state law and the buffer zone is an actual resource area under the bylaw. Exh. 47, ¶¶ 33-34. The developer's expert, on the other hand, testified that "the IVW will be recreated within the… [new] basin… mimic[king] existing conditions," and that this new area, which is over an acre, "will more than compensate for and provide similar functional values provided by the IVW within the ISLF at a ratio of 32:1." Exh. 57, ¶ 5. The Board's expert did not present any specific evidence that the functional values will not be compensated for, but rather testified only that the alteration "will result in much of this meadow being converted to lawn, which has far less value to flora, fauna, and their habitats than a meadow." Exh. 47, ¶33. Nor did he describe with specificity what actual damage will be done where by the proposed landscaping design as compared to the existing condition. He concluded not by stating definitively that there will be significant, permanent damage to the environment, but rather by noting that "given the alteration[s proposed]…, review under the bylaw… could entail some mitigation of the effects of converting meadow to lawn through, for example, long-term protection and preservation of some meadow areas that would not otherwise be protected by the bylaw elsewhere on the project site." Exh. 47, ¶ 35.

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33. The Board's expert occasionally inadvertently referred to this ILSF as being in the southeastern portion of the site. See, e.g., Exh. 47, ¶ 32.

We conclude that the Board has not met its burden of establishing specific local concerns, that is, specific damage to specific interests protected by the local wetlands bylaw, that outweigh the regional housing need.

2. Rural Character (Board's Brief, pp. 29-30) – The Board also argues and presented testimony that its large-lot zoning "serves the purposes of… maintaining the rural character of that section of town, protecting an area 'rich in plant and animal wild life'…, and fostering sustainable development policies by locating denser development toward the center of town…." Exh. 49, ¶ 23(a). These concerns were presented only as generalities, however, and the Board has not proven with sufficient precision exactly what the impact of the proposed development in this regard will be, nor that it outweighs the regional need for housing.

D Miscellaneous Conditions

1. Duplex Homes (Board's Brief, p. 30) – The Board points out that more of the affordable units than market-rate units will be in duplex structures, and suggests that the affordable units will be distinguishable from market-rate units. Exh. 49, ¶¶ 35, 36. In nearly all communities, for market-rate as well as affordable housing, some differences in affluence are apparent from the size and types of homes in which people live. Particularly in a community such as Sherborn, where new market-rate houses tend to be large, the market frequently dictates that the affordable units in a development built under the Comprehensive Permit Law be smaller than the market-rate units. Designing some affordable units as duplex units may in fact allow them to blend more readily with larger homes. We need not decide the appropriateness of the design, however, since this is the sort of policy or programmatic concern that is primarily within the province of the subsidizing agency or project

administrator. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 6-7 (Mass. Housing Appeals Committee Jun. 25, 1992); cf. *Stuborn Ltd. Partnership v. Barnstable*, No 98-01, slip op. at 21-23 (Mass. Housing Appeals Committee Decision on Jurisdiction Mar. 5, 1999). With regard to this development in specific, since funding will be provided through a non-governmental entity under the FHLBB New England Fund, a state project administrator will ensure that the design complies with state policy before construction begins. See 760 CMR 31.01(2)(g), 31.09(3).

2. Appliances (Board's Brief, p.46) – The Board has also required that all affordable units be supplied with washers, dryers, and microwave ovens. This, like the design of duplex homes, is a programmatic detail to be overseen by the state project administrator. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 6-7 (Mass. Housing Appeals Committee Jun. 25, 1992); 760 CMR 31.01(2)(g), 31.09(3).

3. Foundation Drains (Board's Brief, p.45) – The Board has required foundation drains that "pitch continuously away from the unit at not less than 1 to 200 to daylight…." Exh. 2, finding 9(d) (p. 26). Since the basement floors of the homes will be set 16 inches above the seasonal high groundwater level, these drains are a "'back-up' system," though a necessary one, since the seasonal high groundwater level will be exceeded occasionally. Exh. 37, ¶ 79; 51, ¶ 20. But due to the relatively flat topography of the site, the 1 to 200 slope to daylight cannot be achieved for all units without the placement of additional fill. Exh. 37, ¶ 79. The developer has agreed to provide foundation drains that meet the Board's specifications wherever it is practical. Exh. 59, ¶ 8. The Board has shown no flaw in the developer's compromise position—that where the slope cannot be achieved, foundation

drains will still be provided, but they will be drained by sump pumps instead of gravity drainage—and we therefore find that it is acceptable. See Exh. 37, ¶ 79; 51, ¶ 20; 59, ¶ 8.

4. Parking (Board's Brief, p.46) – The Board has permitted the developer to construct a clubhouse and swimming pool on the site, and has required that it provide eleven adjacent parking spaces. Exh. 2, finding 4 (p. 18). The developer argues that it is common for no parking at all to be provided at this sort of private facility, that the pool is near the center of the site (less than a quarter of a mile from the farthest house), and that the entire development is designed to encourage walking, and that therefore five spaces are sufficient. We are hampered in resolving this dispute by the lack of detailed evidence presented by either party with regard to either technical standards or experience in similar developments. See Exh. 36, ¶ 51; 37, ¶ 66; 49, ¶41; 58, ¶ 13. While the concern about parking is certainly legitimate, the evidence presented by the developer indicates that five spaces conform to generally recognized standards for this sort of development, and, more important, the Board has not presented sufficiently specific evidence to meet its burden of establishing a need for more. Exh. 36, ¶ 51; 37, ¶ 66; 49, ¶41; 58, ¶ 13.

5. Local Preference (Board's Brief, p.47) – The developer objects to the "broad requirements for local preference" imposed by the Board. Pre-Hearing Order, § IV-3(10); see Exh. 2, finding 10 (p. 27-28). We see no problem, however, with granting preference for the affordable units to current residents, their families, and people employed in Sherborn or to others groups recommended by the Sherborn Housing Partnership, so long as it is done under the supervision of the project administrator and subject to state law and policy. See 760 CMR 31.09(3).

6. Filing of Subdivision Plan and Bond (Board's Brief, p.47) – It is entirely appropriate for the Board to require a bond, covenant, or other surety to guarantee completion of streets, utilities, and similar matters. Such requirements shall be imposed in the same manner as they would be if the development were a subdivision. Further, prior to construction, the developer shall be required to prepare for the Board's signature and for recording a comprehensive permit plan in place of a definitive subdivision plan. That comprehensive permit plan shall conform to this decision, and its submission shall not require further hearings before the Board.

7. Source of Water Supply (Developer's Brief, p. 25) – The Board has indicated that should the developer desire to connect the development to either the Ashland or Holliston water supply, it would deem that change to be substantial, requiring further hearings. Exh. 2, finding 8(n) (p. 23); see 760 CMR 31.03(3). But such a change would mitigate local concerns about water supply and it is therefore insubstantial. See 760 CMR 31.03(2)(b). Therefore, the requirement is stricken.

8. Modification to Structures (Board's Brief, p. 32) – As the Board points out, it is useful to have a clear understanding of what considerations should control if owners wish to consider building additions to their homes in the future. See Exh. 49, ¶ 26. The condition imposed by the Board, however, appears likely to prohibit any such change. See Exh. 2, finding 9(i) (p. 27); also see Exh. 36, ¶ 52. A better approach is to permit modifications, if appropriate, by considering the building to be a preexisting nonconforming structure and applying the standards used under G.L. c. 40A, § 6.

V. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit, but concludes that certain of the conditions imposed in the Board's decision render the project uneconomic and are not consistent with local needs. The Board is directed to issue an amended comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development, consisting of 48 total units, including 12 affordable units, shall be constructed as shown on drawings by Meridian Associates, Inc. (Comprehensive Permit Drawings – Whitney Farm), Mar. 2, 2004 (Exh. 4).

(b) With regard only to testing procedures to measure well capacity, all private wells shall comply with Department of Environmental Protection Private Well Guidelines (Exhibit 28).

(c) The emergency access road shall be paved with stabilized grass pavers and foundation sufficient to support a 65,000-pound vehicle, no-parking signs shall be posted, and the roadway shall at all times be maintained clear of snow and other obstructions.

(d) The tennis court shall not be lighted.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: March 27, 2006

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Christine Snow Samuelson

James G. Stockard, Jr.

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